

petition. Appendix F-4. Collier chose to abandon the unexhausted ground for relief. Appendix E-2.

The State filed an answer to the remaining ground for relief, arguing that consideration of the ground was procedurally barred and, even if not, without merit. Appendix E-2.

Collier sought leave of court to file a traverse, which was granted. Collier subsequently filed a notification to the court that he would not be filing a traverse. Instead, Collier filed a legal brief on procedural default. Appendix E-2.

The federal district court found that Ground One was procedurally barred from federal review and denied Collier's federal habeas petition. Appendix E-2.

The federal district court granted a certificate of appealability with respect to these issues:

- 1) That the procedural bar applied by the Nevada Supreme Court and relied upon by this court is inadequate to foreclose federal review; and

- 2) That Petitioner made an adequate showing of cause and prejudice to overcome the procedural bar.

Appendix C-3, C-6.

The Ninth Circuit Court of Appeals reversed the order of the federal district court and filed an opinion in which the majority of the panel concluded that, as applied, the procedural bar was not adequate to preclude federal habeas review. *Collier v. Bayer*, 408 F.3d 1279 (9th Cir. 2005). Judge Bea dissented. Appendix A. The State filed a petition for rehearing and suggestion for rehearing en banc, which was denied.

REASONS FOR GRANTING THE WRIT

This case presents this Court with the opportunity to resolve the splits of authority between the circuits and to ascribe once and for all which party has the burden of demonstrating the adequacy or inadequacy of a state procedural bar clearly and expressly relied upon to preclude consideration of a claim or claims in a federal habeas action.

This Court has long recognized the principle that a federal court may not review a claim in a federal habeas action if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support it. *Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). In *Harris v. Reed*, 489 U.S. 255, 264, n.10 (1989), this Court held that procedural default would not bar a federal review unless the last state court to enter judgment explicitly invokes or "clearly and expressly" states the judgment rests on state procedural bar and, further, state procedural default will still bar federal habeas review if the state court also reaches the merit in an alternative holding as long as procedural bar is clearly invoked as a separate basis. The adequacy of a state procedural default is itself a federal question. *Lee v. Kemna*, 534 U.S. 362, 375 (2002).

Prior decisions suggest that there is a presumption of adequacy when a state court clearly and expressly states that its judgment rests on a state procedural bar. *Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989); *Harris v. Reed*, 489 U.S.

255, 262-65 (1989); and *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988). Indeed, the *Dugger* Court held the petitioner's citation to a few state cases ignoring the state procedural bar is insufficient to show inadequacy.

Relying on *Harris*, The Fifth Circuit found the existence of such a presumption. *Sones v. Hargett*, 61 F.3d 410, 416-417 (5th Cir. 1995). Relying on *Dugger*, the Fifth Circuit has found the basis for such a presumption. *Lott v. Hargett*, 80 F.3d 161, 165 (5th Cir. 1996).

The Fourth and Seventh Circuits appear to find such a presumption. *Smith v. Dixon*, 14 F.3d 956, 972 (4th Cir. 1994); *Prihoda v. McCaughtry*, 910 F.2d 1379, 1384 (1990).

However, the Ninth Circuit has stated that it ascribes no presumption of adequacy at all. *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003).

There is also a question regarding the showing by the federal habeas petitioner that is necessary to place the adequacy of the state procedural bar at issue. As noted, the

Dugger Court held that the petitioner's citation to a few state cases ignoring the state procedural bar is insufficient to show inadequacy. That begs the question: Just what must the petitioner do to place the question of the adequacy of a state procedural bar at issue in a federal habeas proceeding? Just exactly what quantum of proof must a petitioner present in order to demonstrate that a state procedural bar is inadequate?

The Ninth and Tenth Circuits employ a burden-shifting analysis that requires the state to plead the affirmative defense of an independent and adequate state procedural bar, the burden to place that defense in issue shifts to the petitioner who must show, at a minimum, sufficient evidence of inconsistency by asserting specific factual allegations that demonstrate the inadequacy of the rule, and once having done so, the ultimate burden is the state's. *Bennett v. Mueller*, 322 F.3d 573, 585 (9th Cir. 2003); *Hooks v. Ward*, 184 F.3d 1206, 1217 (10th Cir. 1999).

Furthermore, the courts are divided on the issue of which party bears the ultimate burden. For example, the Fifth Circuit places upon the petitioner the ultimate burden of demonstrating that the state procedural bar is inadequate. *Amos v. Scott*, 61 F.3d 333, 340-41 (5th Cir. 1995); *Sones*, 61 F.3d at 417. On the other hand, the Ninth Circuit has rejected the Fifth Circuit view and places upon the respondent states the ultimate burden of demonstrating the adequacy of the state procedural bar. *Bennett*, 322 F.3d at 584-86. The Tenth Circuit also places the ultimate burden on demonstrating the adequacy of a state procedural bar on the State. *Hooks*, 184 F.3d at 1217.

The Fourth and Seventh Circuits appear to place the ultimate burden upon the petitioner. *Smith*, 14 F.3d at 972; *Prihoda*, 910 F.2d at 1384.

The Second Circuit has assumed without deciding that the state bears the burden of proving the adequacy of the state procedural rule. *Cotto v. Herbert*, 331 F.3d 217, 238 (2nd Cir. 2003).

This case presents the opportunity to resolve the splits of authority identified above.

The Ninth Circuit has previously recognized the adequacy of NRS 34.726, the state procedural bar at issue in this case. *Valerio v. Crawford*, 306 F.3d 742, 778 (9th Cir. 2002) (*en banc*); *Loveland v. Hatcher*, 231 F.3d 640, 643 (9th Cir. 2000); *Moran v. McDaniel*, 80 F.3d 1261, 1269 (9th Cir. 1996). However, in this case, the Ninth Circuit failed to afford a presumption of correctness to this procedural bar under circumstances indistinguishable from *Valerio*, *Loveland*, and *Moran*, permitting the Ninth Circuit to avoid the plain language of NRS 34.726.

Indeed, the Ninth Circuit itself had already soundly rejected the argument that for a procedural bar to be "well-established" and, therefore; adequate, a state court must have already ruled that a particular attempt to circumvent that procedural bar is invalid. *Bargas v. Burns*, 179 F.3d 1207, 1211 (9th Cir. 1999). Simply because no

Nevada court had previously stated that a second motion to correct an illegal sentence does not re-start or toll the time in which to file a state habeas petition, any more than a first such motion, does not mean that the law was not well established. In this case, the Ninth Circuit wrongly presumed that that a statute is not well-established law unless a court has ruled that a statute means what it says. NRS 34.726(1) and NRAP 4(b) are both quite clear about what will toll the time to file an appeal and a habeas petition.

In 2004, the Nevada Supreme Court held that the statute of limitations for filing a state post-conviction action did not restart with the filing of an amended judgment of conviction. *Sullivan v. State*, 96 P.3d 761, 764 (Nev. 2004). Although *Sullivan* was not decided at the time Collier was convicted in 1995, NRS 34.726 was well established, having been enacted in 1991. Thus, the majority's decision conflicts with *Bargas*.

Furthermore, this case presents this Court with the opportunity to ascribe once and for all which party bears the ultimate burden of demonstrating the adequacy or inadequacy of a state procedural bar. In this case the panel majority incorrectly applied the burden of proof, even under its own precedent, because *Collier* never established the inadequacy of NRS 34.726(1). *Collier* 408 F.3d at 1284, n.6. The panel decision conflicts with *Bennett* because once the State pled the existence of an independent and adequate state procedural ground as an affirmative defense, as Respondents did in this case, the burden to place that defense in issue shifts to the petitioner. *Bennett*, 322 F.3d at 586. Under Ninth Circuit law, the petitioner may satisfy this burden by asserting specific factual allegations that demonstrate the inadequacy of the state procedure, including citation to authority demonstrating inconsistent application of the rule. In Step One the state pleads a procedural bar. The burden is then shifted to the petitioner. In Step Two the

petitioner must demonstrate the inadequacy of the procedural bar, including "citation to authority demonstrating inconsistent application of the rule."

However, in this case, Collier did not allege any specific factual allegations or cite to any cases where the Nevada Supreme Court failed to apply NRS 34.726 consistently, so that one could conclude that NRS 34.726 was not "well-established." Collier has not cited any cases where the Nevada Supreme Court allowed a motion to correct an illegal sentence to re-start either the time to file an appeal or the time to file a state habeas petition. Respondents carried their burden under Step One; however, Collier failed to carry his burden under Step Two as described in *Bennett*. Contrary to the requirements of *Bennett*, the majority completely skipped Step Two.

CONCLUSION

Petitioners respectfully request that this Court grant their petition for writ of certiorari for the reasons expressed above.

Respectfully Submitted,

GEORGE J. CHANOS
Attorney General of the
State of Nevada

DAVID K. NEIDERT *
Senior Deputy Attorney General
Criminal Justice Division
5420 Kietzke Lane, Suite 202
Reno, Nevada 89511
Telephone: (702) 850-4110

* Counsel of Record

Supreme Court, U.S.
FILED

05 - 589 NOV - 4 2005

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

GLEN WHORTON, Director, et al.,

Petitioners,

v.

STEVEN WAYNE COLLIER,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE
NINTH CIRCUIT**

**APPENDICES
VOLUME 1 OF 1**

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVEN W. COLLIER,)	No. 04-15017
<i>Petitioner-Appellant,</i>)	D.C. No.
)	CV-99-00641-ECR/
vs.)	RAM
)	
BOB BAYER,)	OPINION
<i>Respondents-Appellee.</i>)	

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding

Argued and Submitted
November 4, 2004 – San Francisco, California

Filed June 3, 2005

Before: Betty B. Fletcher, Sidney R. Thomas, and
Carlos T. Bea, Circuit Judges.

Opinion by Judge B. Fletcher
Dissent by Judge Bea

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals reversed and remanded a judgment of the district court. The court held that, at the time when a Nevada state prisoner filed a motion to correct

an illegal sentence, Nevada's procedural rules governing time limits for filing a habeas corpus petition and tolling of such limits were not sufficiently well-established to preclude federal habeas review.

Petitioner-Appellant Stephen Wayne Collier pled guilty in Nevada state court to trafficking in controlled substances, and was sentenced to 45 years in prison. Collier did not file an immediate direct appeal after entry of final judgment, but he did file a motion to correct an illegal sentence, challenging his judgment of conviction for failing to list the statute under which he was sentenced, and challenging his sentence as exceeding the maximum sentence allowed under an amended, more lenient state sentencing statute. Motions to correct an illegal were not subject to the time bars and procedural hurdles governing direct appeals in Nevada. In response to Collier's motion, the state court issued an amended judgment of conviction, listing the proper statute. Collier filed a second motion to correct an illegal sentence reviving the challenge to his sentence as exceeding the maximum statutory limit. The state court rejected his challenge, concluding that the amended law did not apply to Collier. He appealed, and the Nevada Supreme Court affirmed.

Collier filed a state habeas corpus petition, which the state court dismissed for failure to comply with Nevada's one-year limit for filing a habeas petition. The Nevada Supreme Court affirmed the dismissal. He then filed a federal habeas petition, which the district court denied for failure to comply with Nevada's time limits for pursuing habeas relief.

Collier appealed.

[1] In order for a state procedural rule to preclude federal review, the rule must be clear, consistently applied, and well-established. If a state procedural rule is not well-established before a petitioner supposedly breaks the rule, then the rule cannot prevent federal review of the petitioner's federal claims. Although the state is not required to articulate every permutation of every rule, a rule held generally adequate can be deemed inadequate as applied to particular unique circumstances. Once a petitioner has demonstrated the inadequacy of a rule, the state bears the ultimate burden of proving the rule bars federal review.

[2] The state statute governing time limits for pursuing habeas relief did not distinguish between original judgments of conviction and amended judgments of conviction. Although the Nevada Supreme Court had recently held that amended judgments of conviction did not automatically restart the one-year time limit, that rule was not clearly and well-established at the time Collier filed his motion to correct an illegal sentence. [3]. Further, the Nevada procedural rule governing when the time for appeal of a civil judgment may start anew after an amended judgment did not dictate procedure for criminal habeas appeals.

[4] When Collier filed his motion to correct an illegal sentence, there was little in Nevada's state law to guide the court's understanding of whether this motion was an appeal from judgment, thus tolling the period for filing a habeas petition. Although the Nevada Supreme Court later held that only timely directed appeals qualified as appeals tolling the one-year time limit, that later decision was not determinative in this case. Collier could not be held accountable for rules established after his purported

breach. The procedural rule later announced by the Nevada Supreme Court was not clear and well-established when Collier filed his motion

Judge Bea dissented, stating that it was well-established in Nevada law that a motion to correct an illegal sentence did not either restart or toll the one-year limit for filing a habeas petition.

COUNSEL

Franny A. Forsman and John C. Lambrose, Las Vegas, Nevada, for the petitioner -appellant.

Brian Sandoval and Robert E. Wieland, Reno, Nevada, for the respondent-appellee.

OPINION

BETTY B. FLETCHER, Circuit Judge.

Petitioner-Appellant Stephen Wayne Collier appeals from the decision of the United States District Court for the District of Nevada, which denied his petition for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied Collier's habeas petition for failing to comply with the State of Nevada's time limits for pursuing habeas relief. Collier challenges the adequacy of Nevada's time limit for filing habeas corpus appeals and the tolling provisions provided therein. Further, he argues cause and prejudice to excuse his purported procedural default.

We have jurisdiction pursuant to 28 U.S.C. § 2253. We reverse the district court's decision and hold that the particular application of Nevada's time limits and tolling provisions in Collier's case was not adequately established prior to his appeal. Because we reverse on this ground, we do not reach the question of whether Collier had cause or suffered prejudice.

Standard of Review

Federal district court decisions denying 28 U.S.C. § 2254 habeas petitions for procedural default are reviewed *de novo*. *Fields v. Calderon*, 125 F.3d 757, 759-60 (9th Cir.1997). Factual findings underlying the decision are reviewed for clear error. *Luna v. Cambra*, 306 F.3d 954, 959 (9th Cir.2002). Mixed questions of law and fact involving constitutional issues are reviewed *de novo*. *Tomlin v. Myers*, 30 F.3d 1235, 1241 (9th Cir.1994).

Factual Background

Collier pursues this habeas appeal from a judgment based on a plea and sentence of forty-five years for trafficking in controlled substances. Collier and co-defendant, Christopher Glen Hammond, pled guilty to selling methamphetamine to a government informant, Gary McConnell. Collier and Hammond sold drugs to McConnell on March 12, 1994, while McConnell was working with Nevada's Consolidated Narcotics Unit ("CNU"). McConnell worked with the CNU as part of a plea bargain for trafficking charges pending against him. During the transaction Collier gave drugs to Hammond, who then gave them to McConnell. McConnell paid for the drugs with money given him by the CNU. McConnell

testified against Collier and Hammond at their preliminary hearing on June 9, 1994.

Collier faced a several count information. He was able to negotiate a plea bargain. He pled guilty to one count of drug trafficking and he agreed to a forty-five-year prison sentence. The additional charges against Collier were dropped. Collier's co-defendant pled guilty to a similar charge and he agreed to a ten-year prison sentence.

Five days before Collier was sentenced, a new Nevada law went into effect reducing the minimum and maximum prison sentences for several criminal offenses. The sentence for the offense to which Collier pled guilty was dramatically reduced. The minimum was reduced from ten years to two years. The maximum was reduced from life to fifteen years. [FN1] This statute went into effect July 1, 1995. The revised statute does not apply to any offense committed before the effective date. 1995 Nev. Stat. ch. 443 § 393. Attempts by Collier to challenge his sentence based on the amended statute have failed.

FN1. The amended statute says: "[I]f the quantity involved ... [i]s 14 grams or more, but less than 28 grams, for a category B felony by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not more than 15 years and by a fine of not more than \$100,000." Nev.Rev.Stat. 453.3385(2) (1995).

Previously, the statute read: "If the quantity involved ... is 14 grams or more, but less than 28 grams, by imprisonment in the state prison for life or for a

definite term of not less than 10 years and by a fine of not less than \$100,000." Nev.Rev.Stat. Ann. 453.3385(2) (Michie 1993).

Collier was originally represented by attorney Sferrazza. Sferrazza withdrew as counsel in early 1995 because he took a job in the public sector. The court appointed the county public defender's office to represent Collier. Three different attorneys from the public defender's office represented Collier during his preliminary hearing, plea negotiations, and sentencing. *1282 The final attorney to represent Collier was attorney Mitchell. Mitchell appeared with Collier at his July 5, 1995 sentencing. Mitchell had previously represented McConnell, the government's informant, and had helped McConnell negotiate a plea against several drug trafficking charges in early 1994. As part of the plea bargain, McConnell pled guilty to one count of drug trafficking. The plea resulted in several charges being dropped and the suspension of a five-year prison sentence and \$50,000 fine. McConnell was placed on probation for three years. The transcript of the sentencing proceedings is sealed. Shortly after accepting this plea deal, McConnell was involved with the CNU operation that resulted in Collier's arrest.

Procedural History

A. Proceedings in state court

Collier did not file an immediate direct appeal after entry of the final judgment against him. He did, however, file a motion to correct an illegal sentence on

March 21, 1997 under Nev.Rev.Stat. 176.555 (2004). [FN2] He challenged his judgment of conviction for failing to list the statute under which he was sentenced and he challenged his sentence as exceeding the maximum statutory limit for convictions under Nevada's revised sentencing statute, Nev.Rev.Stat. 453.3385(2). The Nevada state district court issued an amended judgment of conviction, listing the proper statute, on March 26, 1997. The amended judgment did not change the sentence. A few months later, Collier filed a second motion to correct an illegal sentence reviving the challenge to his sentence as exceeding the maximum statutory limit. The state district court considered the merits of this motion and held the amended law did not apply to Collier. He appealed. Two years later, the Nevada Supreme Court denied Collier's appeal on the merits, affirming the state district court. [FN3] The remittitur issued on June 9, 1999.

FN2. In Nevada motions to correct an illegal sentence are a post-conviction remedy available to correct a facially illegal sentence. See *Pangallo v. State*, 112 Nev. 1533, 930 P.2d 100, 102 n. 2 (1996); *Edwards v. State*, 112 Nev. 704, 918 P.2d 321, 323-24 (1996). Motions to correct an illegal sentence (and similar appeals) occur after a conviction and sentencing but they are not collateral attacks. *Passanisi v. State*, 108 Nev. 318, 831 P.2d 1371, 1373 (1992).

Motions to correct an illegal sentence are not subject to the time bars and procedural hurdles limiting other types of appeals. The Nevada Supreme Court said, "Because of the very nature of the remedy sought in a motion for relief from a sentence that is either facially illegal or is the result of a mistaken assumption regarding a criminal defendant's record, time constraints and procedural defaults necessarily do not apply." *Edwards*,

918 P.2d at 324. Collier's motions to correct an illegal sentence were properly filed and were considered on the merits by the Nevada state courts.

FN3. During this same time, Collier filed a belated direct appeal. This appeal was dismissed by the Nevada Supreme Court for lack of jurisdiction due to timeliness.

After the Nevada Supreme Court denied Collier's motion but before the remittitur issued, he filed a state habeas petition on May 28, 1999. The state district court dismissed the habeas petition as untimely, saying the petition violated the one-year time limit for filing habeas appeals. *See Nev.Rev.Stat. 34.726(1).* Collier appealed to the Nevada Supreme Court. The Nevada Supreme Court affirmed.

B. Proceedings in federal court

Collier filed a federal habeas petition in the Nevada federal district court on June 30, 2000. The district court dismissed the petition as mixed (including both exhausted and unexhausted claims), but gave Collier an opportunity to amend his petition. He abandoned the unexhausted claims and pursued only those claims the district court deemed exhausted. The district court denied Collier's habeas petition as barred by Nevada's procedural rule that habeas petitions must be filed within one year of the judgment of conviction or within one year of the Nevada Supreme Court's remittitur from an appeal from judgment. *See Nev.Rev.Stat. 34.726(1).* The district court found Nevada's rule was adequate and independent and that Collier failed to show cause and prejudice for the default. Collier then petitioned for and received a certificate of appealability. The district court

found Collier had "raised a valid showing of the denial of a constitutional right" for ineffective assistance of counsel. The district court also found the adequacy of Nevada's procedural rule "could be debatable among jurists of reason."

Analysis

The State of Nevada requires habeas petitions to be filed within one year of the state supreme court's remittitur in an appeal taken from judgment. Nev.Rev.Stat. 34.726(1). In this case, the trial court amended Collier's final judgment on March 26, 1997. After the amendment, Collier continued to pursue relief through a properly filed motion to correct an illegal sentence. The motion was denied and Collier appealed to the Nevada Supreme Court. The Nevada Supreme Court denied Collier's appeal on the merits on May 13, 1999. Immediately thereafter, on May 28, 1999, Collier filed a state habeas petition. The remittitur from the Nevada Supreme Court's order issued on June 9, 1999.

On the face of Nevada's statute limiting the time to file for habeas corpus relief, Collier's state habeas petition conforms with the state's one year time limit. See Nev.Rev.Stat. 34.726(1). Collier filed his habeas petition within one year of the state supreme court's remittitur on his appeal. The Nevada Supreme Court, however, interpreted the law differently in Collier's case. The Nevada Supreme Court said Collier's state habeas petition was not timely filed under Nev.Rev.Stat. 34.726(1), thus denying Collier's habeas petition on state procedural grounds. [FN4] Collier argues this procedural rule was not adequately established prior to his appeal.

He argues the rule cannot bar his pursuit of federal habeas relief. The Respondent disagrees.

FN4. Federal courts of appeal may not review state courts' interpretations of state law. The Supreme Court said, "[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67- 68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Thus, we defer to the state court's interpretation of state law.

We conclude that the rule was not adequately established prior to Collier's appeal. We find nothing in either the plain language of Nev.Rev.Stat. 34.726 or the Nevada courts' interpretation of that statute to suggest that an amended judgment would not entitle Collier to a new one year time period to pursue habeas relief. Furthermore, there is no established rule that motions to correct an illegal sentence do not qualify as an appeal from judgment, thus tolling the period for filing a habeas petition.

A. Adequate and independent state grounds

For a state procedural rule to prevent federal review of federal claims, the state's rule must be both adequate and independent. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The Supreme Court has held in the habeas context that "this Court will not review a question of federal law decided